LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
NOV 14 1962
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

October Term, 1962.

## No. 509.

ELIJAH REED,

*Petitioner,*

*v.*

STEAMSHIP YAKA, Her Engines, Boilers, Machinery, Etc. (Waterman Steamship Corporation, Owner and Claimant)

and

PAN-ATLANTIC STEAMSHIP CORPORATION,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

## BRIEF FOR RESPONDENT PAN-ATLANTIC STEAMSHIP CORPORATION IN OPPOSITION TO THE PETITION.

T. E. Byrne, Jr.,
Kruseen, Evans and Byrne,
21 South 12th Street,
Philadelphia 7, Pa.,
*Counsel for Respondent, Pan-Atlantic Steamship Corporation*

International, 711 So. 30th St., Phila. 43, Pa.

# INDEX.

## TABLE OF CASES CITED.

## TABLE OF CASES CITED (Continued).



## STATUTES AND AUTHORITIES CITED.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962.

No. 509.

ELIJAH REED,

*Petitioner,*

*v.*

STEAMSHIP YAKA, HER ENGINES, BOILERS, MACHINERY ETC. (WATERMAN STEAMSHIP CORPORATION, OWNER AND CLAIMANT)

AND

PAN-ATLANTIC STEAMSHIP CORPORATION,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

## BRIEF FOR RESPONDENT, PAN-ATLANTIC STEAMSHIP CORPORATION IN OPPOSITION TO PETITION FOR CERTIORARI.

### STATEMENT OF THE CASE.

On March 23, 1956, this respondent, Pan-Atlantic Steamship Corporation [hereinafter Pan-Atlantic] was the owner *pro hac vice* of the S. S. YAKA. The ship had been

delivered to Pan-Atlantic by its owner, Waterman Steamship Corporation [hereinafter Waterman] on March 19, 1956, pursuant to the terms of a charter agreement [bareboat] under which Waterman demised the ship to Pan-Atlantic for a period of time.

On March 23rd, the libellant, an employee of Pan-Atlantic, was engaged in loading the vessel. He and other employees of Pan-Atlantic were using Pan-Atlantic's equipment, including wooden pallets. Those were described by the district court [finding of fact 13 (59a),[1] 183 F. Supp. 69 at 70] as cargo trays, constructed of strips of boards approximately an inch thick, nailed to blocks at each end and reinforced at the corners, making a rectangular pallet about four feet wide, six feet long and four inches high. Pallets of this type are commonly used for loading cargo in the Port of Philadelphia. The practice is that the cargo is placed upon these pallets on the pier—the pallet with the cargo on top of it then being lifted into the hold where the cargo is then removed and stowed. The district court found that the particular pallets all belonged to Pan-Atlantic and that use of the pallets "was the customary, and proper, practice when loading cargo of this nature". The district court found [finding 38] that the pallet which broke when the libellant's foot was on it contained a defect which had existed when it was brought on board the ship a few moments before. It was also found [finding 40] that "the sole cause of this injury was the latent defect in this wooden pallet . . ." The district court found that the existence of this pallet with a defect rendered the S. S. YAKA unseaworthy [finding of fact 41]. There was no finding, and no contention, that the ship itself was defective or in any way unfit.

The officers and crew of the ship were all employees of Pan-Atlantic and so were the longshoremen engaged in

1. In referring to the record we refer to the appellants' consolidated appendix printed for use in the court below followed by the suffix "a". There is printed also an appendix to their brief in opposition to which we will refer with the suffix "z".

loading the vessel. In addition to owning and operating ships [compare *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corporation*, 350 U. S. 124 (1956)] Pan-Atlantic, from time to time, enters into charters under which it becomes the owner *pro hac vice* of vessels owned by other companies.

In ports where the volume of business warrants it, Pan-Atlantic has its own stevedoring division which handles the loading and unloading of its ships. It handles its owned vessels in the same way as it handles ships of which it is owner *pro hac vice*, as in the case at bar.

## REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

### I. The Decision of the Court of Appeals Is Not Violative of the Concepts Enunciated by This Court in Any Prior Decision.

The petitioner asserts that the decision below violates the concepts of decisions set by this Court in *Plamals v. The Pinar Del Rio*, 277 U. S. 151 [1928]. That decision, at least partially disapproved since,[2] had nothing to do with the question involved in the case at bar. It merely determined that the Jones Act, 46 U. S. C. A. § 688, imposed personal liability and gave no lien which could be the subject matter of an *in rem* action. The Court in *Plamals v. The Pinar Del Rio* would seem to disapprove the contention this petitioner advances, for at one point in the decision it was stated:

> "To subject vessels during all of the time allowed by the statute of limitations to secret liens to secure undisclosed and unlimited claims for personal injuries by every seaman who may have suffered personal injury thereon would be a very serious burden. One desiring to purchase, for example, could only guess vaguely concerning the value. 'An act to provide for the promotion and maintenance of the American Merchant Marine' ought not to be so construed in the absence of compelling language." 277 U. S. 151 at 157.

There is nothing about *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, which has the remotest bearing upon the issue presently before the Court. Exactly the opposite is true. In *Sieracki*, the Court recognized th[illegible] the Longshoremen's and Harbor Workers' Compensati[illegible] Act, 33 U. S. C. A. 901 et seq., did restrict and nullify the right of an injured

2. *Mahnich v. Southern Steamship Co.*, 321 U. S. 96 at 105.

longshoreman against the owner of the ship where the owner was also the employer. The Court noted, 328 U. S. at 102, that the situation where the shipowner was also the employer was "presumably rare", but this is that rare case where the longshoreman is in fact in the employ of the owner *pro hac vice* of the vessel.

## II. There Is Not Conflict Among the Circuits.

The petition suggests that the decision in the case at bar is in what petitioner calls "direct conflict" with the decision of the Court of Appeals for the Second Circuit in *Grillea v. United States*, 232 F. 2d 919. The petitioner fails to note that this does not establish conflict at the present time, for a careful examination will reveal that *Grillea* is no longer followed by the Second Circuit, and has been either disapproved or overruled, *sub silentio*.[3] Therefore, conflict does not now exist.

The logic of the decision in *Grillea v. United States*, 232 F. 2d 919, is, at best, obscure. The case has a peculiar history. In the district court it had been dismissed in an unreported opinion by Judge Ryan. One of the grounds for dismissal was that the United States, the owner, "having demised the vessel, was not liable for any unseaworthiness that resulted . . . after the vessel had been delivered." 229 F. 2d 687 at 689. The Court of Appeals for the Second Circuit, therefore, affirmed the judgment of dismissal. *Grillea v. United States*, 229 F. 2d 687.

Thereafter a petition for rehearing was filed, and the Court entered an order upon rehearing which is not officially reported. It is reported 1956 A. M. C. 1227, and is reproduced herein [1z]). It is the opinion in *Grillea* following rehearing, 232 F. 2d 919, which is asserted as in conflict with the holding in the case at bar. It is in that opinion that Judge Hand, speaking for a two to one majority [Judge Swan dissenting] said that he "could see

3. The Fourth Circuit has so conceded. See *Noel v. Isbrandtsen*, 287 F. (2) 783 (1961) at 786 particularly footnote 6.

no reason why a person's property should never be held liable unless he or someone else is liable *in personam*".

That *Grillea* decision was written in 1956. It is more difficult to comprehend when compared with the decision of the same court [composed of identical personnel with Judge Hand writing the opinion] in *Burns Brothers v. Central R. R. of New Jersey*, 202 F. 2d 910 (1953). In that case the court held that after there had been a determination of a suit *in personam*, a second suit *in rem* could not be successfully maintained. Said the Court:

> "Disputes arise between human beings, not inanimate things; and it would be absurd to give the beaten party another chance because on second trial he appears as the claimant to a vessel that is, and can be, nothing but the measure of his stake in the controversy." 202 F. 2d 910 at 913.

In 1960, Judge Hand again wrote the unanimous decision for the Second Circuit in *Latus v. United States*, 277 F. 2d 264. In *Latus* he said:

> ". . . , an implied liability in rem, regardless of any personal duty of the owner, is a fiction, reaching far back into the early history of the law; and as has been often quoted, 'a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong. The Eugene F. Moran, 212 U. S. 466'. We can find no decision in which such a lien has been imposed on a ship for the fault of another person than the owner when that fault is not that of a 'bareboat' charterer, or of some specified class of person like a compulsory pilot.
>
> • • •
>
> Grillea v. United States, 2 Cir., 232 F. 2d 919, merely held that a longshoreman might sue a ship in rem if he was injured by her unseaworthiness, . . ." 277 F. (2) at 267.

## III. There Is Not Liability In Rem Where There Is Immunity From Liability In Personam.

Aside from much loose language in decisions, there is no case, English or American, which holds:

(a) That an inanimate object such as a ship "warrants" its seaworthiness or other fitness.

(b) That there is a separate and distinct liability of the inanimate object apart from that which may arise by reason of the acts, omissions, or contracts of persons lawfully in possession of the ship or otherwise related to her.

That has been plain for seventy-five years; certainly since this Court's decision in *Boyd v. United States*, 116 U. S. 616, at 637 (1886). Pertinent language from this decision is quoted *infra* (pp. 11 and 12).

What of the case, however, where the person lawfully in possession of a ship is not liable or, more properly, is endowed with a personal immunity? These situations are answered by a number of authoritative decisions, all of which point out the necessity of drawing the line of distinction between the liability of the ship for acts of the persons lawfully in possession of her, and liability of the ship *qua* ship. One exists, the other does not.

## IV. Where There Is a Personal Defense, Created by Statute or Otherwise, Liability In Rem Has Been Denied.

### A. The Ship Is in Custodia Legis.

In *New York Dock Co. v. S. S. Pozan*, 272 U. S. 117, the ship was *in custodia legis*. During the period of such custody, charges for wharfage had accrued. This Court approved ". . . the general rule that there can be no maritime lien for services furnished a vessel while in custodia legis", 274 U. S. 117 at 120. See discussion of this case, page 498, *The Law of Admiralty*, Gilmore and Black.

Although the Court in the *Pozan* case allowed the wharfage as part of the administration expense because of action by the Court in directing the ship to proceed to the wharf to unload, the effect of the decision is to deny a maritime lien arising while *in custodia legis*. That is plain from subsequent decisions such as *Vlavianos v. Cypress*, 171 F. 2d 435, cert. denied 337 U. S. 924, where it was held that even a lien for crew's wages could not arise during the time a ship was in the custody of the law. See also *Collie v. Fergusson*, 281 U. S. 52.

B. The Ship Is Owned by the Sovereign.

If there is separate *in rem* liability of a vessel, distinct and apart from that which makes the vessel security for the acts of those in charge of her, what of the question of *in rem* liability of the vessel of a sovereign? This question has been answered by both English and American courts.

In *The Tervaete*, (1922) P. 259, the English Privy Counsel said:

> "In my view it is now established that procedure in rem is not based upon wrongdoing of the ship personified as an offender, but is a means of bringing the owner of the ship to meet his personal liability by seizing his property. The so-called maritime lien has nothing to do with possession, but is a priority in claim over the proceeds of sale of the ship in preference to other claimants . . .
>
> ". . . But for a lien to arise . . . some person having by permission of the owner temporary ownership or possession of the vessel must be liable for the collision.
>
> ". . . Neither the Belgian Government could have been sued in personam, nor could their ship have been arrested in rem. If this is so, I do not understand how there could then be any maritime lien on the ship. To

hold that a lien would come into existence, if the Government sold the ship to a private purchaser, would be to deprive the Belgian Government of part of their property . . ."

In a later case the British courts held the same way with respect to a ship of the United States. See *The Sylvan Arrow*, (1923) P. 220.

In the year that the British Court reached its result in *The Terraete*, this Court reached the same result in *The Western Maid*, 257 U. S. 419 (1922). That case involved three original petitions for writs of prohibition and/or mandamus against district courts to prevent them from exercising jurisdiction of proceedings *in rem*. The cases involved liability for collisions which had occurred while the libeled vessels were owned by the United States or of which it had been owner *pro hac vice* and which had been, at the time of the issuance of process against them, sold or returned to their owners. Speaking for the Court, Justice Holmes said:

> "In deciding this question we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic over-law to which even the United States must bow."
>
> ". . . The United States has not consented to be sued for torts, and therefore, it cannot be said that in a legal sense the United States has been guilty of a tort. For a tort is a tort in a legal sense only because the law has made it so . . . It may be said that the persons who actually did the act complained of may or might be sued, and that the ship for this purpose is regarded as a person. But that is a fiction not a fact and as a fiction is the creation of the law. It would be a strange thing if the law created a fiction to accom-

plish the result supposed. It is totally immaterial that in dealing with private wrongs the fiction, however originated, is in force . . . The personality of a public vessel is merged in that of the sovereign . . ."

"But it is said that the decisions have recognized that an obligation is created in the case before us. Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp . . ."

C. The Provisions of a Statute Intervene.

In *Consumers Import Co., Inc. v. K. K. K. Z.*, 320 U. S. 249, goods being carried at sea had been damaged by fire. The ship's owner brought himself within the terms of the so-called fire statute, 46 U. S. C. A. 182, 186, and, therefore, by the terms of that statute was freed of liability *in personam*. This Court was squarely presented with the question of whether there could be a separate *in rem* liability of the ship where a statute of the United States operated to extinguish personal liability. The Court said:

"Claimant says this (exoneration of owner from in personam liability) means in effect that he shall answer only with his ship. But the owner would never answer for a loss except with his property, since execution against the body was not at any time in legislative contemplation. There could be no practical exoneration of the owner that did not at the same time exempt his property. If the owner by statute is told that he need not 'make good' to the shipper, how may we say that he shall give up his ship for that very purpose? It seems to us that Congress has, with the exception stated in the Act, extinguished fire claims as an incident of contracts of carriage, and that no fiction as to separate personality of the ship may revive them." 320 U. S. at 253, 254.

In deciding the *Consumers Import Co.* case, this Court pointed out that as early as 1886, the courts of this country had rejected the thesis that there could be a liability of property, separate and apart from personal responsibility. The case relied upon was *The Norwich (Place v. Norwich and New York Transp. Co.)*, 118 U. S. 468, where the Court said;

> "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated, unless where, for public reasons, the law exempts particular kinds of property from seizure, such as the tools of a mechanic, the homestead of a family, etc. His property is what those who deal with him rely on for the fulfillment of his obligations. Personal arrest and restraint, when resorted to, are merely means of getting at his property. Certain parts of his property may become solely and exclusively liable for certain demands, as a bound cargo or illegal trade; and it may even be called 'the guilty thing'; but the liability of the thing is so exactly the owner's liability, that a discharge or pardon extended to him will operate as a release of his property. It is true that in *U. S. v. Mason*, 6 Biss. 350, it was held that in a proceeding *in rem* for a forfeiture of goods the owner might be compelled to testify, because the suit is not against him, but against the goods. That decision however, was disapproved by this court in the case of *Boyd v. U. S.*, 116 U. S. 616, 637, in which it is said: 'Nor can we assent to the proposition that the proceeding (*in rem*) is not, in effect, a proceeding against the owner of the property as well as against the goods; for it is his breach of the laws which has to be proved to establish the forefeiture, and it is his property which is sought to be forfeited. In the words

of a great judge: "Goods, as goods, cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are." VAUGHAN, C. J. in *Sheppard v. Gosnold*, Vaugh. 159, 172; approved by PARKER, C. B., in *Mitchell v. Torup*, Parker, 227, 236."

## V. The Fact That the Intervening Statute Is a Workmen's Compensation Act Does Not Change the Result.

There is uniformity of decision among all of the inferior federal courts upon this point. The first Court of Appeals decision was *Samuels v. Munson Line*, 63 F. 2d 861 (C. A. 5, 1933). That decision was followed in *Smith v. The Mormacdale*, 198 F. 2d 849 (C. A. 3, 1952), cert. denied, 345 U. S. 908.

There have been a number of subsequent attempts to circumvent the exclusive liability provision of § 5 of the Longshoremen's and Harbor Workers' Compensation Act. In point of time the next was *Conzo v. Moore-McCormack Lines, Inc.*, 114 F. Supp. 956 (1953). Judge Leibell of the Southern District of New York followed the rule of the *Smith* case and denied a right of recovery beyond that provided in the Compensation Act. The next was *Bennett v. Mormacteal*, 160 F. Supp. 840, affirmed on the opinion of the district court, 254 F. 2d 138 (C. A. 2, 1958), cert. denied, 358 U. S. 817.

It was followed by the District Court for Puerto Rico in *Flores v. Prann*, 175 F. Supp. 140 (1959), construing the Puerto Rican Compensation Act.

A somewhat different tack was tried in *Ginnis v. Southerland*, 313 Pacific 2d 675 (Wash.). There the longshoreman employed by the shipowner sued, individually, the captain of the ship on which the longshoreman had been working when injured. The Supreme Court of the State of Washington, interpreting the Longshoremen's and Harbor Workers' Compensation Act, denied recovery. The interesting decision of the lower court in that case is reported only at 1956 AMC 2272.

There have been many situations where courts have had to consider whether there is actually a liability solely *in rem*, separate and apart from the liability of the person having control of the ship alleged to have been the offending instrumentality. In each the court would have been required to grant recovery if in fact this separate liability akin to "deodand" existed in fact. It was rejected in each case. The theory of a number of earlier decisions and the specific holding in several recent decisions support our position.

In the opinion in petitioner Reed's first admiralty suit *in personam* against Waterman Steamship Corp. [No. 339 of 1956 U. S. D. C. E. D. Pa.] 1958 AMC 658 [not officially reported] Judge Kirkpatrick said:

> "I think it can be taken that the decisions of the Court of Appeals for the Second Circuit in *Canella v. Lykes Bros. SS. Co.*, 174 F. 2d 794; *Grillea v. U. S.*, 229 F. 2d 687 and *Grillea v. U. S.*, 232 F. 2d 919, have established that it is the law that, in the case of a bareboat charter, there is no liability on the part of the owner if the condition arose after the vessel had passed out of his control into that of the demisee, and, as a corollary, that the burden is upon the libellant to show that the unseaworthy condition existed before the delivery of the vessel."

The correctness of that statement of the law has never been challenged by petitioner. In addition to *Canella* and *Grillea*, Judge Kirkpatrick could have cited a long list of cases to support the proposition. It is thus established that there is not and could not be liability of Waterman, *in personam*, for injury to this longshoreman caused by the breaking of a board in the pallet brought on board the ship during the unloading operation then going on, where the possession and control of the ship had passed out of Waterman under

the bare boat charterer some days before the allegedly defective pallet was brought on board ship. If, therefore, there is no *in personam* liability on the part of Waterman, the only *in personam* liability there could be in the case at bar is that of Pan-Atlantic, the employer of Reed, which had complied with the provisions of the Longshoremen's and Harbor Workers' Compensation Act. But by statute Congress had said that there may not be unlimited *in personam* liability on the part of Pan-Atlantic to Reed. This was part of the *quid pro quo* which supported the constitutionality of the Longshoremen's and Harbor Workers' Compensation Act. See *New York Central R. Co. v. White*, 243 U. S. 188 and *Crowell v. Benson*, 253 U. S. 22.

Congress has created for the employer of longshoremen who complies with the requirements of the Compensation Act a personal defense, a situation not at all unique in our law.

Liability in Tort is that of the person lawfully in possession of the ship. That is Pan-Atlantic, and there is no separate liability *in rem*.

We believe we have demonstrated that Waterman's warranty of seaworthiness extended only to the condition of the vessel as of the time it surrendered possession and control of it to the owner *pro hac vice*.[4] For conditions arising thereafter, the owner out of possession would not be subject to *in personam* liability. In the usual case the owner *pro hac vice* would be so liable. That has been settled law at least since the decision in *The Barnstable*, 181 U. S. 464 (1901) if not earlier, *Leary v. United States*, 81 U. S. 607, 610 (1871).

> "In general, all *in personam* liabilities arising out of the ship's operation are brought home to the demise charterer."

---

4. *Vitozi v. Balboa Shipping Co., Inc.*, 163 F. 2d 286 (C. A. 1, 1947); *Canella v. Lykes, Reed v. Waterman*, 1958 AMC 658.

> "It is the demisee who 'is the warrantor of seaworthiness' . . ." Gilmore and Black, *The Law of Admiralty*, 218.

Case law on the point is plain.

*Vitozi v. Balboa Shipping Co., Inc.*, 163 F. 2d 286; *Muscelli v. Frederick Starr Construction Co.*, 296 N. Y. 330, 73 N. E. (2) 536, 1947 AMC 1110.

Even Judge Learned Hand [whose decision in *Grillea v. U. S.*, 232 F. 2d 919 is discussed *supra*] said that he ". . . would altogether agree that the owner-demisor is not liable for *any* unseaworthiness arising after the charter"[5] [emphasis ours].

Unless, therefore, the court is prepared to overturn well established precedent, it is clear that Waterman would not be liable *in personam* for so-called unseaworthiness consisting of a latent defect in a cargo tray or pallet on board YAKA incidental to a loading operation conducted after Pan-Atlantic had assumed possession and control and Waterman had surrendered those incidents of ownership.

Normally then it would be said that if anyone warranted "seaworthiness" of YAKA, or the cargo tray or pallet to Reed, a longshoreman working on board her, it would be Pan-Atlantic. But here Congress has intervened, unless this Court is prepared to say that the constitutional grant of "Admiralty and Maritime jurisdiction"[6] supervenes and displaces the power of Congress.

Another possibility exists. We think that to state it demonstrates its invalidity. It is, of course, possible that this court may say that an inanimate object [YAKA] extends a "warranty" where, by operation of law, a warranty by a person [individual or corporate] does not exist. But is not a warranty contract? Does not contract and/or warranty presuppose someone *sui juris* and capable of making a contract, express or implied, by representation or

5. *Canella v. Lykes Bros. SS. Co.*, 174 F. 2d 794 at 795.
6. Constitution, Art. III, Sec. 2.

voluntary and reasoned decision? Is the inanimate ship YAKA to be personified to this extent? We submit there is no warrant in authority or reason for such a holding.

We distinguish, as we submit must also this Court, between a forfeiture[7] and a warranty. Petitioner fails to distinguish the forefeiture cases, else he would not cite two of them, *The Little Charles*, Fed. Cas. 15,612 and the *Malek Adhel*, 48 U. S. 210, at page 6 of his petition. Both are forefeiture cases based upon specific statutory provisions.

> ". . . But when a fiction has served out its time and purpose, its disappearance, even when it is as agreeable and harmless as the fiction of a ship's personality, is always to be welcomed."[8]

It might even be said by those whose logic goes no deeper than the label that a ship should be held to "warrant" its own seaworthiness because, after all, a ship is a ship and admiralty and maritime law is "different". But can even such fallacious reasoning attribute to an inanimate object the ability to warrant that some human and supposedly superior being will not bring aboard the ship (inanimate and powerless to prevent it) a cargo tray which is defective?

It is interesting and important to note that those who contend for a separate liability *in rem* (apart from liability *in personam*), cite Holmes, *The Common Law*. Cf. Petition, pp. 5 and 6. They do not read completely nor, it is submitted, fully or with comprehension. It is true that language can be found in *The Common Law* which, taken out of full context, could be said to support the concept of liability of the *res*, separate from the liability *in per-*

---

7. A true proceeding against the thing itself. Always the creature of statute [collision with an aid to navigation and transportation of illegal liquor by car are examples]. We are not unmindful of "deodand". If the offending thing is to be forfeited, then why the ship and not just the offending pallet?

8. Gilmore and Black, *The Law of Admiralty*, 510.

*sonam* of those lawfully in possession of her. However, such statements are diametrically opposed to the holding in the opinion written by Holmes in *The Western Maid*. When examined in full context, they are not even supported by *The Common Law*. See Holmes' discussion at pages 29 and 36, *The Common Law*.[9]

That certain of the language upon which opponents of our position must necessarily rely was not intended to be swallowed "in haec verbae" is quite apparent from Holmes' letter to Pollock, Volume 2, page 135. Holmes was referring to a criticism of his decision in *The Western Maid*, 37 Harvard Law Review, 529, when he said: ". . . he seemed to think I had forgotten *The China* (74 U. S. 53) about which I discoursed in *The Common Law* . . ."

For one who will take the time to examine recognized authority dispassionately and will bear in mind the rather acrid comment by Judge Wooley,[10] it becomes clear that while liability *in rem* is a "convenient conceptual tool for many purposes",[11] it is a "ghost elusive to the grasp". It is certainly not something substantial enough upon which to base a holding of liability which would accomplish that which Congress and the Courts [12] have said should not be accomplished.

---

9. Page 29, ". . . to say, 'The ship has to pay for it' (F. N. 3 Black Book of Admiralty, 103) was only a dramatic way of saying that somebody's property was to be sold, and the proceeds applied to pay for a wrong committed by somebody else."

10. "Habit has so much overlaid our thought in many practice matters that their skeletal anatomy oftentimes becomes blurred in our minds." *The J. K. Welding Co. v. Gotham Marine Corporation*, 47 F. 2d 332 at 333.

11. *Smith v. The Mormacdale*, 198 F. 2d 849.

12. *Swanson v. Marra Brothers*, 328 U. S. 1; *Vitozi v. Balboa Shipping Company, Inc.*, 163 F. 2d 286 (C. A. 1, 1947); *Samuels v. Munson SS. Lines*, 63 F. 2d 861 (C. A. 5, 1933); *Smith v. The Mormacdale*, 198 F. 2d 849 (C. A. 3, 1953), cert. den. 345 U. S. 908; *Bennett v. The Mormacteal*, 160 F. Supp. 840, 254 F. 2d 138 (C. A. 2, 1958); *Noel v. Isbrandtsen Co.*, 287 F. 2d 783 (C. A. 4, 1901); *Pichirilo v. Guzman*, 290 F. 2d 812 (C. A. 1, 1961), reversed on other grounds, 369 U. S. 698.

Reasoning by the application of labels does not, we respectfully suggest, require the application of modern *stare decisis* to the point where intellectual honesty must be sacrificed. Otherwise, a court would reach judicial decision based upon popular expediency because it believed it heard the cry "to the guillotine" echoing in the background.

## VI. The Indemnity Provision in the Charter Contract Neither Justifies Nor Calls for a Different Result.

It is elementary that the indemnity provision in the contract between Waterman and Pan-Atlantic does not, simply because it is an indemnity contract, create rights in third parties. More than that, it is simply declarative of the common law. Ever since *The Barnstable*, 181 U. S. 464 (1901), it has been unquestioned law that one of the implied obligations of a charter which constitutes the demisee owner *pro hac vice* is that the obligation of the demisee is to return the ship free and clear of liens.

Pan-Atlantic has never, during the entire proceedings in this case, questioned its obligation under the general maritime law, as stated in this Court's decision in *The Barnstable*, 181 U. S. 464 (1901).[13] It must satisfy all liens against the YAKA at the time it redelivered the ship to its owner when Pan-Atlantic's ownership *pro hac vice* terminated. An examination of the docket entries in the case at bar [R. 1a] demonstrates clearly that this entire case is nothing less than a device to circumvent an Act of Congress [33 U. S. C. A. 901, 905]. The device employed is to use a label [in rem], but that label misrepresents the contents of the package. There was never any process under which the ship was attached and no stipulation for value. See this Court's comments upon the effect of such

13. See also the recent decision (October 29, 1962) in *Ferrigno v. Ocean Transport, Ltd. v. Pittston Stevedoring Corp.*, (C. A. 2) — F. (2d) —, reversing in part, 201 F. Supp. 173.

a stipulation in *Continental Grain Co. v. The Barge FBL-585*, 364 U. S. 19. It has been said:

> "The stipulation for value is a complete substitute res, and the stipulation for value alone is sufficient to give jurisdiction to a court because its legal effect is the same as the presence of the res in the court's custody." *J. K. Welding Co. v. Gotham Maritime Corp.*, 47 F. 2d 332 at 335.

Without attachment of the ship or a stipulation for value filed, it is abundantly plain that what is really sought to be accomplished is not enforcement of liability *in rem* as such. The procedural device originally intended to enforce financial responsibility where jurisdiction over the person could not be obtained is here sought to be perverted. Petitioner seeks to impose liability upon Pan-Atlantic in a situation where Congress by frequent amendments to the Compensation Act, has reaffirmed the principle that the absolute liability of the employer shall be "exclusive and in place of all other liability of such employer to the employee". 33 U. S. C. A. 905.

## CONCLUSION.

We submit that the Second Circuit no longer follows *Grillea v. United States*, 232 F. 2d 919; that there is not conflict among the circuits; and that the decision below is correct. In footnote 2 to its recent decision in *Guzman v. Pichirilo*, 369 U. S. 698, 82 S. Ct. 1095, reversing upon other grounds the First Circuit's decision reported 290 F. 2d 812, this Court noted that the First and the Third Circuits subscribe *in toto* to the principle that *in rem* liability does not exist without underlying liability *in personam*. This Court did not note the Fourth Circuit's decision in *Noel v. Isbrandtsen*, 287 F. 2d 783 (1961), cert. denied, 366 U. S. 975. That decision places the Fourth Circuit squarely on the same side of the line, for it specifically rejects the concept of liability *in rem* apart from liability *in personam*, 287 F. 2d at 785, et seq.

There is, therefore, no conflict and nothing about the holding below which warrants this Court examining the decision of the Court of Appeals.

Certiorari should, therefore, be denied.

Respectfully submitted,

T. E. Byrne, Jr.,
Krusen, Evans and Byrne,
*Counsel for Respondent,*
*Pan-Atlantic Steamship*
*Corporation.*

## APPENDIX.

---

FELICE GRILLEA,

*Petitioner,*

*v.*

UNITED STATES AND NATIONAL SHIPPING AUTHORITY.

---

United States Court of Appeals, Second Circuit.

---

ROBERT KLONSKY, *for the Petitioner.*

JOSEPH M. CUNNINGHAM, THOMAS F. FEENEY, *in Opposition.*

---

### Opinion on Petition for Rehearing.

PER CURIAM:

The libellant moves for a rehearing because of the concluding paragraph of our opinion, in which we said that we would not consider whether a maritime lien arose because of "unseaworthiness occurring after the demise." Our reason was that the libellant had not elected to sue "in rem," either in this libel or afterwards; and the present petition is directed to that issue alone, apparently upon the assumption that we held that such a lien did arise which the libellant could have invoked by a timely election. We fear that we may have misled the libellant into so assuming by the following language earlier in the opinion: "There remains the question whether the respondent is liable because of the unseaworthiness of the hatch cover placed where it was after the ship had been delivered upon a demise. That it would have been liable only if the ship

had been unfit when delivered to the demisee we held in *Cannella v. Lykes S. S. Co., supra,* 1949 A. M. C. 1094, 174 F. (2d) 794; and we adhere to that ruling, so that the issue depends upon whether the charter was a demise." This is not to be regarded as holding that any lien ever did arise, and we will allow the libellant to file a supplemental brief in support of the position that, although the ship was seaworthy, as to her hull, tackle, gear and stowage, she became unseaworthy, because after the demise the longshoremen placed the wrong hatch cover over the "padeye," and that a lien arose against her because of the misplacement.

If the libellant wishes to present such a brief, he must file and serve it on or before April 3rd, and if he does, the respondent may file an answer on or before April 9th.